No. 14868

In the United States Court of Appeals for the Ninth Circuit

BESSIE LASKY AND JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT THEREOF

CHARLES K. RICE,
~~Acting~~ Assistant Attorney General.
LEE A. JACKSON,
I. HENRY KUTZ,
Attorneys, Department of Justice,
Washington 25, D. C.

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Comes now the respondent, Commissioner of Internal Revenue, and moves this Court to dismiss the petitions for review filed herein for lack of jurisdiction. As grounds for this motion respondent states taxpayers' petitions for review were not filed within three months after the decisions of the Tax Court were rendered as required by Section 1142 of the Internal Revenue Code of 1939, and Section 7483 of the Internal Revenue Code of 1954. Decisions in the case of each taxpayer respectively were rendered by the Tax Court on April 8, 1954. (R. 92-93.) Petitions for review by this Court were not filed until August 10, 1955. (R. 6, 145-149.)

The facts, which are not in dispute, stated in support of this motion are as follows:

On April 8, 1954, the Tax Court promulgated its findings of fact and opinion in the above-entitled con-

solidated cases (R. 62-92) after hearing had befor
Judge Harron on December 10 and 11, 1951, and th
subsequent filing of briefs by both sides (R. 2-3).

The opinion concluded with the following word
(R. 92): "Decisions will be entered for the respond
ent." On April 8, 1954, the Tax Court rendered it
decision in the case of each of the taxpayers, decidin
in the case of taxpayer Bessie Lasky that there is
deficiency in income tax for the year 1943 in the amou
of $224,722.55, and in the case of taxpayer Jesse L
Lasky that there is a deficiency in income tax due fo
the year 1943 in the amount of $224,515.14. (R. 92-93.
A copy of each of these decisions was, as appears belov
served by the Clerk of the Tax Court on April 9, 195
by registered mail on Mr. Herschel B. Green, the firs
attorney of record for the taxpayers in the Tax Cou
proceeding. (R. 92-93.)

No petition for review of these decisions in the Cou
of Appeals was served within three months after Apr
8, 1954, the date the decisions were rendered.

Up to this point taxpayers had been represented i
the Tax Court by Messrs. Herschel B. Green and Loy
Wright of Wright, Wright, Green and Wright, an
Mr. Harrison Harkins. (R. 62.) However, on o
about August 24, 1954, after expiration of the thre
months' period following the rendering of the decisio
by the Tax Court, the present attorney for taxpaye
filed with the Tax Court a motion for leave to file
motion to vacate its decisions here out of time. (R. 9
94.) This motion was granted and taxpayers moved t
vacate the decisions entered in these cases on April 8
1954, by a motion lodged on August 24, 1954. (R. 94.
On September 10, 1954, taxpayers filed four affidavit
in support of this motion to vacate the decisions o

April 8, 1954, made respectively by taxpayer Jesse L. Lasky, his secretary, Randolph Rogers, and his attorneys Herschel B. Green and Harrison Harkins, each dated September 7, 1954. (R. 95.) The facts stated in these affidavits are in substantial agreement and from them the following appears:

Mr. Herschel B. Green was one of the attorneys of record for taxpayers in the Tax Court, connected with the firm of Wright, Wright, Green and Wright with offices at 111 West 7th Street, Los Angeles, California. (R. 101.) Shortly after April 8, 1954, there were received at these offices the findings of fact and opinion of the Tax Court in these cases and shortly after the receipt of the opinions and on April 14, 1954, there was held a conference at these offices attended by taxpayer Jesse Lasky, his secretary, Mr. Rogers, and his attorneys, Mr. Harkins, Judge Milliken, Mr. Loyd Wright and Mr. Green. (R. 95, 101.) At this conference the findings of fact and opinion of the Tax Court were discussed as well as what future action should be taken, including such matters as the possibility of appeal or compromise. (R. 95-96, 99, 101-102, 103-104.) During the course of this conference Mr. Lasky was told that the decisions of the Tax Court in these cases would be received separately from the findings and opinion and he would have three months after the date the decisions were entered within which to appeal. (R. 96, 99, 102, 104.) Mr. Green promised to notify Mr. Lasky immediately upon receipt of the decisions. (R. 102.)

What occurred subsequently is stated in Mr. Green's affidavit as follows (R. 102-103):

> Thereafter, Affiant talked with Mr. Lasky, or his secretary, on two or three occasions, when Affiant

was asked if the Decisions had been received, an Affiant informed him on each occasion that the had not. During one or two telephone conversa tions with Mr. Harkins, we made mention of th fact that the Decisions had not been received an that Affiant was keeping a constant lookout for th receipt [sic] of these Decisions, having in mind th ninety-day appeal period above referred to.

On or about July 26, 1954, Mr. Harkins informe Affiant that he had received word from the desk o the Tax Clerk that the Decisions had been entere in the two cases on April 8, 1954, and that copie thereof had been mailed to us. Affiant thereupo made an immediate search of the Lasky files i his office, and at that time and for the first time dis covered copies of the two Decisions. They were o letter-size paper and had been permanently place in one of the Lasky files on the correspondence sid of the file rather than the legal side. Affiant there upon, on that same day, telephoned Mr. Lasky an informed him that in going through his files Affian had found the two Decision[s] and *they* they [sic were dated April 8, 1954.

Mr. Green also wrote Mr. Lasky under date of Augus 5, 1954, as follows (R. 98):

Agreeable to your telephone request, there ar enclosed the decisions of The Tax Court in Mr Lasky's and your tax cases.

You will note that these decisions are dated Apr 8, 1954. They did not come to my attention until discovered them in going through the file last week They came in separately from the two opinions an

were apparently here in the office at the time when we held the conferences with Judge Milliken, Mr. Harkins and others to discuss the contents of the Court's opinion.

I had been on the look-out for these decisions from the inception due to our discussions relative to an offer in compromise.

Mr. Harkins, who was also one of the attorneys of record, stated that under date of July 20, 1954, he wrote the Clerk of the Tax Court and inquired about the status of the proceedings and (R. 105)—

That on July 26, 1954, your affiant received a letter from the Clerk of the Court, dated July 23, 1954, informing him that the decisions had been entered and had been served April 9, 1954, upon the first counsel of record in the proceedings, Herschel B. Green, Esq., 111 West Seventh Street, Los Angeles 14, California;

That on July 26, 1954, your affiant informed Mr. Green of the communication from the Clerk of the Court; and Mr. Green on the same date informed your affiant that copies of the decisions had been found in the files of his office;

That on July 26, 1954, Jesse L. Lasky informed your affiant that Mr. Green had that day told him that copies of the decisions had been served on Mr. Green.

Taxpayers' motion to vacate the decisions was heard by Judge Harron on September 14 and 16, 1954 (R. 106-133), where taxpayers were represented by their present counsel, who, as aforesaid, had not had any prior association with the case (R. 115). From the state-

ment of the court and counsel the following addition facts appear:

The court stated (R. 114):

> Now, the records of the Tax Court show that t decisions in Docket Nos. 26396 and 26397 were se by registered mail and, as I understand from M Ash's statement, the Petitioners here do not de that copies of the order of this Court, which called a decision, were received in the office of M Herschel B. Green in Los Angeles under registere mail. The decisions were mailed to Mr. Green office because he was the attorney who first entere his appearance.

Further it appeared without dispute that there w no record in the Tax Court of the receipt of any lett of inquiry prior to Mr. Harkins' letter to the Cle dated July 20, 1954 (R. 114-116), and that the thr months had expired on or about July 8, 1954 (R. 116 Judge Harron stated that she had never received a letter of inquiry from counsel. (R. 116, 126-127 The court pointed out that the findings and opini indicated that the decision either was not to be entere here under Tax Court Rule 50, which would have r quired a computation, but was expressly stated to entered for the respondent (R. 116-117) and in this co nection the court observed (R. 119):

> So the question must come up as to why no i quiry was made until July 20 about the decisi since the legend under the findings of fact and opi ion said, "Decision will be entered for the R spondent." There was no Rule 50 computation be made. The order of decision was entered in

mediately upon the "filing" officially of that findings of fact and opinion.

At the adjourned hearing on September 16, 1954, there transpired the following colloquy between court and counsel here pertinent. The court inquired (R. 126-128):

> I wonder, Mr. Ash, if any explanation has been given to you about why Mr. Harkins, for example, waited so long to ask Mr. Mersch [Clerk of the Tax Court] about the entry of the decisions. As you all know, decisions to be entered for Petitioner and Respondent, even if you had a complicated order to write, would not take more than a half hour to have drafted, typed, and signed. It is very easy to find out from the Clerk whether the judge is on the job or is sick, or is in Washington or away on a Calendar, and what I cannot understand is what Mr. Harkins, who tried this case, was thinking of.
>
> What did he think I was doing? Why did he think it would take me three months to have prepared and signed an order which takes not more than a half hour to get done?
>
> I have looked in the file to see if there was a motion for reconsideration filed or if there was any motion pending that would give Mr. Harkins or any of the counsel ground for thinking that while a motion for reconsideration was being considered a decision would not be entered or something. Have you any explanation?
>
> Mr. Ash: The only explanation I have is—first of all, I will preface it by saying that any of us who do tax work would certainly take the position that Your Honor is taking, because you recognize

that the decision would be simultaneous practicall
with the findings of fact and opinion except in som
unusual situations like you mentioned. The onl
possible explanation is that, of course, Harkin
did repeatedly ask Mr. Green if the decisions ha
come down and was assured that they had not.

As I understand it, for some reasons the Ta
Court sent copies of the findings of fact and opi
ion to each of the counsel of record but, of cours
following the established practice that we all know
the decisions went only to Mr. Green.

The Court: That still does not give me an answe
to the question.

Mr. Ash: I do not know the answer.

The Court: Mr. Harkins could call Mr. Gree
20 times and Mr. Green could say "We haven
received a copy of the decision." What woul
Mr. Harkins think I was doing at this end of th
rope?

Mr. Ash: If I were in their position, I woul
make some inquiry after maybe a week or two t
find out if the decisions had been entered.

The Court: I must say that while we all observ
the formalities—we must observe the judicia
position; otherwise we are always available to cou
sel to answer their questions and consider thei
problems. I cannot locate in the record motio
that might have been considered as a reason for d
laying the entering of the decisions.

Mr. Ash: I cannot understand it and I wa
astonished as could be when I first heard of th
thing, which was just shortly before Mr. Heubus
of our office came down and looked through the fi

and said there is not a thing in the file since the entry of decisions, no motions or anything, and we just could not believe that that could happen, but it did.

The Court: The Calendar Section tells me that the decisions went by registered mail April 9. I guess they went by ordinary mail, not airmail, so it probably reached Los Angeles a week later.

The Commissioner, though regretting that the situation had arisen, made clear through his counsel his objection to the granting of the motion to vacate on the ground that the Tax Court was without jurisdiction in the premises (R. 112-113) and filed a memorandum of authorities in support of his position (R. 121-122). In response to inquiry by the court, counsel for the Commissioner stated that since the Tax Court was without jurisdiction, his opposition to the motion was based both upon the law and as a matter of policy (R. 129):

The Court: * * *

As I understand it, Respondent does not object to the granting of the motion made to vacate the decisions, but takes the position that the Tax Court is powerless to act, isn't that it? Are you taking the lawful position?

Mr. Ray: No, unfortunately, Your Honor, we do object. Not only do we object on the ground that the Tax Court has no jurisdiction, but we do object because as a matter of policy where the Tax Court has no jurisdiction we cannot become a party to or have any part of granting a motion in circumstances where the Tax Court has no jurisdiction.

At these hearings of September 14 and 16, 1954, the motion to vacate, notwithstanding that the matt was open for full discussion and fully discussed fr all angles (R. 106-133), no suggestion was made taxpayers' behalf that a rehearing was requisite f the purpose of offering additional evidence on t merits. Substantially the only matters brought were what had in fact occurred in the instant case a the extent of the Tax Court's power to extend the ti for filing a petition to review in relief of mistake a inadvertence.

Nevertheless, subsequently on or about October 1954, taxpayers moved for leave to file an amendme to the motion to vacate the decisions out of time, whi was granted. (R. 133-134.) This amendment to t pending motion to vacate the decisions reads as follo (R. 134):

> "Come now the above-named petitioners by the attorney, Robert Ash, and move the Court vaca the decisions entered herein on April 8, 1954, *f the purpose of granting petitioners a rehearing the case on its merits.*
>
> "The statement of facts and supporting a davits in support of this motion are incorporat herein by reference." [Italics supplied.]

The statement of facts, which taxpayers filed in su port of their amended motion on October 11, 1954 (4), suggests that the court should exercise its disc tion and grant the motion to vacate the decisions a order a rehearing for reasons which are itemized und six headings. The first four may be summarized follows:

1. The findings of fact and opinion of the Tax Court were promulgated April 8, 1954.

2. Decisions were entered for respondent on April 8, 1954.

3. The fact that the decisions were entered did not come to the attention of taxpayers until more than three months had elapsed.

4. Copies of the decisions which were mailed to their counsel did not actually come to counsel's attention upon their receipt as they were inadvertently misfiled. Consequently counsel advised taxpayers and others making inquiry on their behalf that the decisions had not been received and this advice was given to taxpayers by their counsel through mistake of fact.

The statement then continues (Appendix B, *infra*) :*

> (5) Because petitioners had no knowledge that the decisions had been entered on April 8, 1954, and because their counsel advised them affirmatively upon inquiry that the decisions had not been entered, through no fault or negligence of the petitioners they did not file this motion to vacate the decisions within the time allowed by Rule 19 (e) of the rules of this Court.
>
> (6) In view of the foregoing, good cause exists which justifies the Court in vacating the decisions heretofore entered on April 8, 1954, for the purpose of granting petitioner a rehearing of the case on its merits. At a rehearing of the case the petitioner would present additional evidence which

* The original of this "Statement of Facts," which, though designated as part of the record and for printing, the Tax Court Clerk inadvertently omitted, has now been certified and transmitted and is printed as Appendix B, *infra*.

will show that the opinion and decision of t
Court is wrong on its merits. The evidence wou
show:

(a) That the agreement of May 15, 1940, a
the supplemental agreement of May 15, 19
by which the petitioner sold to Warner Brothe
all his right to the Sergeant York Story a
Warner Brothers agreed to pay petitioner
part of the gross receipts in varying percentag
from the distribution of the photoplay are e
tirely separate and distinct from the emplo
ment contract between petitioner and Warn
Brothers dated May 8, 1940.

(b) The evidence would show in detail that
bona fide dispute existed in 1942 between pe
tioner and Warner Brothers. Additional w
nesses would be produced to establish this i
portant fact.

(c) Evidence would be produced to show th
the sale by petitioners on December 4, 1942,
United Artists Corporation was a bona fide sa
to a third party with no understanding th
United Artists Corporation would resell
Warner Brothers. This evidence would sho
conclusively that United Artists Corporati
was not a mere intermediary in the transactio

(d) The evidence would show in detail t
business purpose behind petitioner's sale
United Artists Corporation on December 4, 19

(e) Upon receipt of this additional eviden
at a rehearing it is petitioner's opinion that t
Court will revise its opinion in accordance wi
the newly-presented facts and hold that the sa

> by the petitioners of their property rights to United Artists Corporation on December 4, 1942, was a bona fide sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code and that the transaction had been properly reported in their 1942 Federal Income Tax Return. Consequently, the decisions on the rehearing would be that there was no deficiency in tax due from the petitioners for the taxable year 1943.

Thereafter, without any further proceedings, by order dated December 13, 1954, the Tax Court granted taxpayers' amended motion and ordered (R. 135)—

> That the decision in each proceeding which was entered on April 8, 1954, be vacated and set aside for the purpose of granting petitioners a further hearing on the merits.

This order of December 13, 1954, recited that it was based on cause shown in the amended motion, lodged October 11, 1954, and in the statement of facts in support thereof (summarized and quoted immediately above).

The Acting Chief Counsel, Internal Revenue Service, thereupon moved to vacate this order of December 13, 1954, on the ground that the Tax Court's decision had become final and the court was without power to grant taxpayers' motion. (R. 136-137.) This motion was denied, as was also a motion for review by the entire Tax Court of the order vacating the decisions. (R. 137.)

Pursuant to the order of December 13, 1954, the Tax Court held a further hearing (January 21, 1955, con-

tinued January 26, 1955). (R. 300-385.) This heari
was exclusively on the merits. Additional testimo
was taken of taxpayer Jesse L. Lasky and of three ad
tional witnesses. At the conclusion of the testimo
Judge Harron outlined in detail the Tax Court's pra
tice with respect to the entering of its decisions (
375-380), proposing an improvement and at the e
stating (R. 380-381):

> I think it is apparent to you why I can't p
> this in an opinion. If I did, the opinion wou
> probably have to be reviewed by the whole cou
> but I think that in this case, for the purposes
> an Appellate Court, this explanation might be he
> ful because it's very hard to find out what our pr
> cedure is like.

The court then said (R. 382-383):

> We have had briefs in this case. I really do
> see the need for the filing of supplemental brie
> You have asked the court to give the matter furth
> consideration of the question that was origina
> presented. The court has heard some additio
> testimony. Briefs have been filed on the matt
> regarding the court giving this matter further co
> sideration, and so unless counsel wish to file su
> plemental briefs I am not going to ask for any.

However, counsel for taxpayers desired the oppo
tunity of filing a brief and counsel for the Comm
sioner stated (R. 383) in response to the court's
quiry as to whether he wished to file a brief:

> Mr. Transue: * * * our position has been th
> there has been no ground for a re-hearing, a

there has been no newly discovered evidence or any other justification for a re-hearing.

Of course, we still maintain our contention that the court is without any jurisdiction to give any further consideration to the matter. If Your Honor permits Mr. Bauersfeld to file a brief I would like to have some period thereafter to consider it and see whether I desire to file one.

In response the court stated (R. 383-384):

On the matter of the continuing objection of the respondent I simply want to say that this seems to be an extraordinary situation and one which merited the exploring of what is involved in the court's own procedure, and I have given you a report on that.

To what extent do you intend to go into your supplemental brief?

Mr. Bauersfeld, this case as you know, was tried before the court by Harrison and Harkins [*sic*] in Los Angeles, and complete briefs have been filed. When I granted a motion for reconsideration I didn't intend in granting that motion to consider the question de novo. Do you understand?

Mr. Bauersfeld: I understand.

The Court: And I believe you prepared the brief, Mr. Bauersfeld, on the matter of whether we could exercise any discretion in the matter of giving this further consideration. Just exactly what do you want to cover in the supplemental brief?

Mr. Bauersfeld: I would like to cover in the supplemental brief only the new evidence as it may affect the prior decision of the court from a factual standpoint.

> The Court: And you don't intend filing a bri
> to reargue the case?
>
> Mr. Bauersfeld: Not the entire case, no, Yo
> Honor.
>
> The Court: I think I will have to make it cle
> that the matter of reconsideration was gone in
> upon the understanding that you had some ne
> evidence to present. The question now is wh
> additional findings of fact should be made and
> what extent the additional evidence may or shou
> be considered in connection with the origin
> briefs. With that understanding you may file
> brief.

By orders and decisions entered on June 30, 19
(R. 138-141, 144-145) the Tax Court stated that it h
concluded after hearing held on taxpayers' motion
vacate the decisions and for rehearing on the meri
(R. 138-139):

> that there existed extraordinary circumstances a
> good cause for granting extraordinary reli
> namely, (1) further hearing on the merits to e
> able the petitioner to present new and addition
> evidence; and (2) reconsideration by the Cou
> of the issue presented to determine whether t
> Court made any erroneous conclusion of fact
> law in its original findings of fact and conclusio
> of law. * * * In order to reconsider the issue
> this proceeding on the merits and to receive furth
> and additional evidence, the Court vacated its
> cision entered on April 8, 1954, received furth
> and additional evidence at a rehearing, and rec
> sidered the issue on the merits.

The orders and decisions continue that on the basis of the entire record in the proceeding, the original evidence and additional evidence adduced at the further hearing, the court was not persuaded that it erred in its original findings of fact and conclusions of law and decided that there were deficiencies in income tax for 1943 in the amounts of $224,515.14 and $224,722.55 against the respective taxpayers Jesse Lasky and Bessie Lasky. (R. 139-141, 144-145.) These are the identical amounts determined in the decisions of April 8, 1954. (R. 92-93.) At the same time when it entered these decisions the Tax Court made additional findings of fact. (R. 141-144.) The petitions for review to this Court are from these decisions entered June 30, 1955. (R. 147.)

Wherefore, it is respectfully requested that this Court enter an order dismissing this appeal for lack of jurisdiction on the ground that petitions for review were not filed within three months after the decisions of the Tax Court were rendered.

CHARLES K. RICE,
Acting Assistant Attorney General.

MARCH, 1956.

NOTICE OF MOTION

To: Robert Ash, Esquire
Attorney for Petitioners
1921 Eye Street, N. W.
Washington, D. C.

Please take notice that the undersigned will bring t
above motion to dismiss on for hearing before t
United States Court of Appeals for the Ninth Circu
at the time and place designated by the Court for t
hearing of the cause on the merits.

CHARLES K. RICE,
~~Acting~~ Assistant Attorney General.

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ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

QUESTION PRESENTED

Whether or not the Tax Court decisions had become final and the limitation period had expired before taxpayers filed petitions for review by this Court.

ARGUMENT

Since Taxpayers Failed to File Petitions for Review Within Three Months After the Tax Court Rendered Its Decisions, This Court Is Without Jurisdiction to Review the Tax Court Decisions

A. *The Tax Court decisions rendered April 8, 1954, have at all times remained in full force and effect and the Tax Court was without power after July 8, 1954, to make the purported order of December 13, 1954, vacating its decisions and granting taxpayers a further hearing on the merits*

The entire scheme of the Internal Revenue Code of 1939 with respect to the jurisdiction of the Tax Court

and review of its decisions is based upon the Congressional direction fixing a specific date upon which a decision of the Tax Court shall become final. This was also the provision of preceding Revenue Acts and has continued without change in the Internal Revenue Code of 1954. Thus, Congress not only fixed a time limitation after which a petition for review by a court of appeals might not be filed (Internal Revenue Code, Section 1142, Appendix A, *infra*) but additionally expressly directed (Internal Revenue Code, Section 1140, Appendix A, *infra*) the time when the Tax Court decision shall become final. As the cases cited below hold, Section 1140 denies to the Tax Court and all courts reviewing its decisions, including the Supreme Court, the jurisdiction to vacate or grant a rehearing with respect to a decision of the Tax Court or its review subsequent to the date specified in Section 1140, when the Tax Court decision shall become final.

Thus Section 1142 provides that a decision of the Board (now the Tax Court) may be reviewed by a Court of Appeals "if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered." In addition, Section 1140 so far as here pertinent reads as follows:

The decision of the Board shall *become final*—

> (a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *. (Italics supplied.)

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[1] References to the Internal Revenue Code are unless otherwise indicated to the Internal Revenue Code of 1939.

The importance of this date, when the Tax Court decision becomes final, is apparent from the frequent references to it in the procedure set up by Congress for the Tax Court and the place of the Tax Court in the determination and assessment of taxes. Thus, the Commissioner is required in case of a deficiency to serve a notice of deficiency upon the taxpayer and he is prohibited from making an assessment of the deficiency until the expiration of the ninety days, within which taxpayer may commence a proceeding in the Tax Court "nor, if a petition has been filed with the Board, until the decision of the Board *has become final.*" Section 272(a)(1) (italics supplied). Moreover, if the Tax Court upon redetermination finds a deficiency, the deficiency shall be assessed and paid upon notice and demand when the decision of the Board "*has become final.*" Section 272(b) (Appendix A, *infra;* italics supplied). Again, Section 272(h) (Appendix A, *infra*), specifically provides that "the date on which a decision of the Board *becomes final* shall be determined according to the provisions of section 1140." (Italics supplied.) Indeed, the Committee report, which recommended the adoption of the predecessor of Section 1140, as Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9, explained (S. Rep. No. 52, 69th Cong., 1st Sess., p. 37 (1939-1 Cum. Bull. (Part 2) 332, 360)):

> *Date on which decision becomes final.*—Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run

> upon the day upon which the Board's decision be comes final, it is of utmost importance that thi time be specified as accurately as possible. I some instances in order to achieve this result th usual rules of law applicable in court procedur must be changed. For example, the power o the court of review to recall its mandate is made t expire 30 days from the date of issuance of th mandate.

Thus, the statute additionally fixes the time for th running of the limitations on assessment and collec tion, but, in particular, qualifies the inherent power o the courts to reconsider judgments, even during th term in which they are entered.

In litigation affecting the public revenue the nee for certainty and finality is especially evident from th taxpayers' as well as the Government's viewpoint Furthermore, Section 1140 through its limitation o review speeds disposal of income tax controversies. A the Tax Court itself has recognized, it constitutes statute of repose for a tribunal of limited jurisdictio *Rippel & Co.* v. *Commissioner*, 36 B.T.A. 789. At a early date in the history of this tribunal, speaking o the predecesssor of Section 1140 the Supreme Cour in *Old Colony Tr. Co.* v. *Commissioner,* 279 U.S. 716 726-727, sid.

> By § 1005, the decision of the Board is to becom final in respect to all the numerous instances whic in the course of the review may naturally end fur ther litigation. In the provisions of these sections the legislation prescribes minute details for th enforcement of the judgments that are the resul of these petitions for review in the several court

> vested with jurisdiction over them. The complete purpose of Congress to provide a final adjudication in such proceedings, binding all the parties, is manifest * * *.

The Supreme Court has held that the authoritative and explicit requirements of Section 1140 deprive even that Court of its otherwise existent jurisdiction to grant petitions for rehearing or otherwise exercise the traditional power to review and reconsider a judgment during the term in which it was entered. *Helvering* v. *Northern Coal Co.*, 293 U.S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225. Hence, contrary to the view expressed by the Tax Court below (R. 139) it is immaterial, even if correct, that sessions of the Tax Court are not limited by a "term," for the highest authority holds that Section 1140 prevents reconsideration even during the term, once the Tax Court decision under the provisions of Section 1140 has become final.

The courts have repeatedly held that the statute deprives the Tax Court and the reviewing courts of jurisdiction to vacate a decision of the Tax Court or of the reviewing courts and to grant a rehearing (even for good cause shown otherwise warranting the granting of a rehearing) once the period of limitation prescribed by Section 1140 has elapsed and the decision of the Tax Court has become final. This is the holding of the Supreme Court decisions cited above and of the decision of this Court in *Swall* v. *Commissioner*, 122 F. 2d 324, certiorari denied, 314 U.S. 697. This is also the rule enunciated in the following cases: *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C.A. 5th); *Sweet* v. *Commissioner*, 120 F. 2d 77 (C.A. 1st); *Crews* v. *Commissioner*, 120 F. 2d 749 (C.A. 10th), certiorari

denied, 314 U.S. 664; *Denholm & McKay Co.* v. *Com missioner,* 132 F. 2d 243 (C.A. 1st); *McCarthy* v. *Com missioner,* 139 F. 2d 20 (C.A. 7th); *Monjar* v. *Commis sioner,* 140 F. 2d 263 (C.A. 2d); *White's Will* v. *Com missioner,* 142 F. 2d 746 (C.A. 3d).

This rule has, of course, been applied against th Commissioner as well as against taxpayers. *Helverin* v. *Northern Coal Co., supra; Commissioner* v. *Realt Operators, supra; Denholm & McKay Co.* v. *Commis sioner, supra.*

B. *Ignorance through inadvertence of taxpayers o their counsel of the rendition by the Tax Cour of its decisions was ineffective to confer upon th Tax Court the jurisdiction which Congress ex plicitly had denied, to vacate its decisions afte lapse of the three-month period, and grant a ne hearing on the merits*

Cases like the present one, where the Commissione or the taxpayers have asserted that their failure to see relief within the period prescribed by Sections 1140 an 1142 of the Internal Revenue Code has been due t failure to receive notice of the Tax Court's decision o because of reliance upon counsel, nevertheless have re sulted in rulings that the Tax Court was without juris diction over its decision after it had become final unde the statute; similarly the courts of appeal are held fo the same reason without jurisdiction to review decision of the Tax Court after the prescribed statutory perio has expired. *Commissioner* v. *Realty Operators, supra Swall* v. *Commissioner, supra; McCarthy* v. *Commis sioner, supra; Monjar* v. *Commissioner, supra.*

As the facts stated in support of the motion show

supra, a copy of each of the decisions of April 8, 1954, actually was served by registered mail upon the first counsel of record for the taxpayers, although unfortunately this did not actually come to the attention of the attorneys in charge at that office or their associates until after the expiration of the three-months period. (R. 102-103, 114.) Apparently it is the practice of the Tax Court to serve copies of decisions and under its rules where a party is represented by more than one counsel service is made only upon counsel whose appearance was first entered of record.[2] However, no explanation appears for the failure of counsel or associate counsel to recognize from the explicit direction in the opinion that "Decisions will be entered for the respondent" (R. 92), that the decisions would be entered forthwith and no computation under Rule 50 was requisite. Indeed, since the opinion also expressly declared (R. 92) that "The respondent's determination is sustained," it was further apparent that the Commissioner's determination, as stated in the deficiency notice, was sustained, and no further computation was necessary. Entry of the decisions under this opinion on its face submittedly was a *pro forma* matter.

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[2] Rules of Practice before the Tax Court (Rev. Nov. 1952):

RULE 22.—SERVICE

* * * * *

(b) *Upon first counsel of record.*—Service upon any counsel of record will be deemed service upon the party, but, where there are more than one, service will be made only upon counsel for petitioner whose appearance was first entered of record—unless the first counsel of record, by writing filed with the Court, designates other counsel to receive service, in which event service will be so made.

The Tax Court judge made some suggestions for improvement of this practice (R. 378-381), but these cannot, of course, affect the result here.

In particular, it is significant that counsel made
inquiry of the Tax Court about the status of the p
ceeding literally for months until July 20, 1954, a
after the expiration of the three-months period. (
102, 104-105.) The present counsel for taxpayers a
mitted at the hearing on the motion to vacate, in
sponse to question by the Tax Court judge, that he w
unable to explain why the Clerk of the Tax Court h
not previously been asked about the entry of the de
sions. (R. 126-128.)

In any event, the statute nowhere requires service
decisions of the Tax Court upon counsel. Nor d
it make limitation of the time for filing petition for
view or for fixing the date of finality of the Tax Cou
decision depend at all upon service of a decision or
tice to taxpayer or his counsel of entry of decisi
Section 1142 confers jurisdiction to review a Tax Cou
decision by a Court of Appeals, if a petition for su
review is filed by either the Commissioner or taxpay
"within three months after the decision is *rendered*.
(Italics supplied.) Section 1140, prescribing when T
Court decision becomes final, insofar as here pertine
provides that the decision shall become final upon "t
expiration of the time allowed for filing a petition f
review, if no such petition has been duly filed with
such time * * *." Notwithstanding the apparent pra
tice of the Tax Court to serve the first counsel of reco
with a copy of a decision and the circumstance that
a matter of fact such service actually here occurred, t
limitation on time for review is in no sense condition

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[3] A decision is "held to be rendered upon the date that an or
specifying the amount of the deficiency is entered" (Sect
1117(c), Appendix A, *infra*), here April 8, 1954. (R. 92-93.)

upon such service or notice to counsel, but the statute clearly fixes the date from the actual rendition of the decision.

Surely it is plain that the failure by taxpayers to realize that the time to file petitions for review was running was here due to no fault of the Tax Court or the Commissioner. See *McCarthy* v. *Commissioner, supra,* p. 21. As already noted in like regrettable situations the limitation statute has been held binding upon the Commissioner. Had the tables been turned and the Commissioner sought under similar circumstances to vacate the Tax Court decisions and for a new hearing after the expiration of the time limited by Sections 1140 and 1142, and had the Tax Court granted such an application and the Commissioner then sought to review the Tax Court's decision on rehearing, to adopt the language of the First Circuit in *Commissioner* v. *Sweet, supra,* p. 82, "In such an eventuality the taxpayer's cry of dismay would be loud and long, and not without reason."

C. *No extraordinary circumstances appear on this record, such as warranted the Tax Court to vacate its decisions of April 8, 1954, and order a rehearing on the merits, assuming that tribunal possessed jurisdiction similar to that of a court to grant a writ of error coram nobis*

The Tax Court below vacated the April 8 decisions "for the purpose of granting petitioners a further hearing on the merits" (R. 135), by its order dated December 13, 1954, and by the same order set the case down for hearing. After having held the hearing in January, 1955, and heard additional testimony the Tax Court en-

tered its orders and decisions on June 30, 1955 (R. 138 141, 144-145) in which it concluded that it had not erred in its original decisions and also explained that it had earlier vacated these decisions because (R. 138-139)—

> The Court concluded that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original findings of fact and conclusions of law. *LaFloridienne J. Buttgenbach & Co.* v. *Commissioner,* 63 F. 2d 630; *United States* v. *Morgan,* 346 U. S. 502; *United States* vs *Mayer,* 235 U. S. 55; *Wayne United Gas Co.* vs *Owens-Illinois Glass Co.,* 300 U. S. 131; Rule 60(b) Federal Rules of Civil Procedure; *Reo Motors, Inc* vs. *Commissioner,* 219 F. 2d 610. In order to reconsider the issue in this proceeding on the merits and to receive further and additional evidence, the Court vacated its decision entered on April 8, 1954 received further and additional evidence at a rehearing, and reconsidered the issue on the merits

Most of the authorities cited relate to the jurisdiction of a court to issue a writ of error *coram nobis;* they are plainly distinguishable from the present record since no such extraordinary circumstances are here present which possibly could warrant the exercise of jurisdiction to grant a writ of error *coram nobis.* Thus in *Reo Motors* v. *Commissioner,* 219 F. 2d 610 (C.A 6th), the facts were that the Commissioner and taxpayer had stipulated that the Commissioner's computation of

taxpayer's excess profits credit was correct and in its application there for extraordinary relief taxpayer alleged (p. 611) that—

> because of a mutual mistake of fact, an error had been made in the stipulation of its excess profits credit resulting from the omission from its invested capital of more than two million dollars paid in for stock; that if the correct excess profits credit had been used there would have been no deficiency in petitioner's excess profits tax for 1942; that the Commissioner had admitted this error in connection with another proceeding involving petitioner's excess profits tax liability for 1943; * * *

The Sixth Circuit held only that the Tax Court has power in extraordinary circumstances to vacate and correct its decision, even after it has become final, similar to the jurisdiction of a court to grant a writ of error *coram nobis;* the court expressed no view as to whether the circumstances in the cited case were so extraordinary as to invite the exercise of that discretion. Whether or not the cited case was correctly decided—and we think it was not, in view of the provisions of Section 1140 of the Internal Revenue Code and of the decisions of the Supreme Court in the *Northern Coal Co.* and *Simpson & Co.* cases and of the other courts above cited —in any event the circumstances there of mutual mistake of fact in entering into a stipulation, upon which the decision of the Tax Court had allegedly been based, were certainly entirely different from the record facts.

Indeed, in the *Reo Motors* case the taxpayer additionally alleged (p. 611):

> that in 1949 the petitioner had sought relief from its excess profits tax for the year 1942 under § 722

> of the Internal Revenue Code of 1939, 26 U.S.C.
> § 722, in response to which the Commissioner ha
> contended that no § 722 relief could be given becau
> the allowance of the petitioner's proper credi
> would result in no excess profits tax liability for th
> year 1942, making inapplicable the relief prov
> sions of § 722.

Moreover, in its opinion the Sixth Circuit quoted fro
a letter from the Commissioner supporting this alleg
tion. (P. 611, fn. 1). Further the court there note
(p. 612) that—

> The petitioner points out that the Commissione
> not only concedes this factual error, but is seekir
> to take advantage of it to the detriment of the p
> titioner in resisting petitioner's claim under § 72

This consideration may well have affected the court
decision there. By contrast here the Commissioner wa
not at all at fault and was in no sense a party to th
error or inadvertence. Submittedly the *Reo Moto*
case constitutes no authority for the Tax Court's orde
here. [4]

United States v. *Morgan,* 346 U.S. 502, and *Unite*
States v. *Mayer,* 235 U.S. 55, which discuss the circum
stances under which a writ of error *coram nobis*
granted, again plainly show that no such extraordinar

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[4] Nevertheless the Sixth Circuit's decision in *Reo Motors,* date
February 23, 1955, is cited instantly in the Tax Court's subsequer
order and decision of June 30, 1955. (R. 138.) However, th
Tax Court's order here dated December 13, 1954 (R. 135), orig
inally vacating the decisions of April 8, 1954, was cited to th
Sixth Circuit and is the decision intended to be referred to in i
opinion (p. 612) (although the citation there given (22 T.C. 13
is actually to the official report of the original findings and opinio
of the Tax Court (R. 62-92)).

situation whatsoever is present in the instant record.[5] By contrast all that the Tax Court here asserted as the ground for exercise of power to grant "extraordinary relief" (R. 138) was "to enable the petitioner to present new and additional evidence" and to enable the court to reconsider the issue, to determine whether it had made any erroneous findings or legal conclusions. These bore no resemblance to possible errors, which went to the regularity of the proceeding itself, such as in a criminal case the failure without competent waiver to furnish the defendant with counsel, or that the defendant being under age appeared by attorney, such as justify the grant of *coram nobis*.

Furthermore, the nature of the additional evidence proffered by taxpayers here is shown in their statement of facts in support of the amended motion (Appendix B, *infra*) and upon the basis of which the Tax Court expressly acted in granting its order of December 13, 1954. (R. 135.) See also summary of the additional testimony made by the court in its order and decision of June 30, 1955 (R. 139-141) and its memorandum sur order and decision (R. 141-144). Submittedly the showing made to the Tax Court was not such as would justify even granting a new trial on the basis of newly discovered evidence—had the motion been timely—since the evidence offered was merely cumulative and it was

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[5] Thus with reference to such writs in the *Mayer* case, the Supreme Court said (p. 69):

> This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid.

See also *United States* v. *Morgan, supra,* p. 507, fn. 9.

not such as by due diligence could not have been ad
duced at the original hearing. Surely, in any event i
presented no cause for granting extraordinary relief i
the nature of writ of error *coram nobis.*

The record on appeal in the *Swall* case, *supra,* wher
this Court held in the light of the *Northern Coal Co*
case, the Board should have dismissed the proceedin
for want of jurisdiction, shows that the taxpayer ther
also moved for a writ of *coram nobis.* Docket No. 9758
Moreover in the *Swall* case, p. 325, this Court con
sidered that the Fifth Circuit's decision in *LaFlor*
dienne J. Buttgenbach & Co. v. *Commissioner,* 63 F. 2
630, cited by the Tax Court (R. 138), has in effect bee
overruled by the *Northern Coal Co.* case, and the Su
preme Court denied certiorari in the *Swall* case. Th
Buttgenbach case has also been questioned or distin
guished by the First Circuit in the *Sweet* case, *supra*
p. 81, the Second Circuit in the *Monjar* case, *supra*
p. 265, and the Third Circuit in the case of *White'*
Will, supra, pp. 748, 749. In any event on its facts th
Buttgenbach case is readily distinguishable from th
instant record, since the order of the Board there va
cated was not really a judgment of the Board but wa
based on a stipulation and the Board itself had neve
ascertained what if any taxes were owed. Both partie
were agreeable to setting aside the stipulation, an
the Fifth Circuit declared (p. 631):

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[6] There the grounds, upon which taxpayer relied in vain as justi
fication for vacating the earlier decision, were that the taxpayer
representative before the then Board of Tax Appeals had not bee
admitted to practice and that he had fraudulently induced taxpaye
to dismiss the proceeding for his own personal gain. Lack o
jurisdiction in the Tax Court to vacate its decisions of April 8
1954, here certainly follows *a fortiorari.*

> We rule only that a redetermination based on a stipulation may be vacated at the instance of the parties to the stipulation for good cause shown.

Finally, as the Supreme Court pointed out in *Wayne Gas Co.* v. *Owens Co.,* 300 U.S. 131, 137, "Where it appears that a rehearing has been granted only for that purpose [to extend the time for appeal] the appeal must be dismissed."[7] This statement by the Supreme Court was quoted in the *Realty Operators Co.* case, *supra,* p. 289, and applied by the Fifth Circuit against the Commissioner and his petition for review was dismissed, when based upon a Board order which had vacated its previous decision. This principle plainly possesses instant application. Taxpayers' original motion was simply to vacate the decisions entered on April 8, 1954. (R. 94.) At the full hearing, which was held on this motion on September 14 and 16, 1954 (R. 106-133), there was no suggestion that a further hearing on the merits was necessary to enable taxpayers to present new and additional evidence; substantially all that was discussed was the circumstances under which the time to file petitions for review had been permitted to lapse. Indeed, it was not until October 11, 1954, that the suggestion first was made that the Tax Court vacate the April decisions for the purpose of granting taxpayers

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[7] Moreover, the holding in the cited *Wayne Gas Co.* case that a bankruptcy court in a reorganization proceeding has power in its sound discretion to reopen an order dismissing the reorganization petition, notwithstanding that the time allowed for appeal from the order has expired, is without instant application. The reasoning of the court (p. 137) shows that the rule would have been different, if the statute there had contained a provision similar to Internal Revenue Code Section 1140, as, indeed, its decisions in the *Northern Coal Co.* and *Simpson & Co.* cases demonstrate.

a rehearing on the merits and the statement of fac
above referred to was filed. (R. 133-134.) As alread
pointed out the additional testimony was merely cum
lative, including testimony from taxpayers' own a
countant and more testimony from taxpayer Jes
Lasky, and was not shown to be newly discovered.

If taxpayers believed that the justice of their cau
required the receipt of additional evidence on th
merits, which was the nominal reason for vacating th
decisions and for the rehearing, it is not explained wh
they waited for approximately six months after r
ceiving the Tax Court's findings and opinion befo
even suggesting to the Tax Court the need for a rehea
ing; nor is it explained why in the original motion
vacate and in the course of the discussion at the hea
ing on that motion no relief by way of adducing add
tional evidence on the merits was applied for or i
necessity explained. The subject of discussion on th
contrary was taxpayers' failure to appeal in tim
There was no requirement that taxpayers await th
Tax Court's decisions before moving for rehearing,
in fact the alleged extraordinary need existed, for a
ducing additional evidence. Indeed, the Tax Court
rules contemplate that such a motion for further hea
ing be filed within thirty days after the *opinion* ha
been served. (Rule 19(e).) Again, at the conferen
held on April 14, 1954, attended by taxpayer, Jes
Lasky, and his attorneys, who had conducted the tria
there was no intimation of a great and extraordinar
need to adduce additional evidence; the further actio
contemplated in the light of the Tax Court's opinio
was apparently appeal or compromise. (R. 96, 99, 10
102, 103-104.) The inference seems compelling tha

the October 11, 1954, amendment to the motion to vacate "for the purpose of granting petitioners a rehearing of the case on its merits" (R. 134) was an afterthought for the purpose of extending the time for appeal.

The Federal Rules of Civil Procedure do not apply to Tax Court proceedings.[8] In any event Rule 60(b), cited by the Tax Court in its order and decision of June 30, 1955 (R. 138), does no more at the most than authorize relief by motion or otherwise similar to that formerly granted by the abolished writ of *coram nobis* and, as already discussed the present record presents no occasion for the exercise of jurisdiction in the nature of *coram nobis*.

Submittedly, the prescription of Section 1140 of the Code made final the April 8, 1954, decisions of the Tax Court here and no jurisdiction analogous to writs of *coram nobis* is possesed by the Tax Court. But assuming *arguendo* that the Tax Court possesses jurisdiction analogous to that of a writ of error *coram nobis*, the present record presented no occasion whatsoever for the exercise of such extraordinary relief and the direction of Section 1140 prevented the Tax Court from vacating its April 8, 1954, decisions here.

CONCLUSION

Since these decisions of April 8, 1954, remained at all times in effect and the order of the Tax Court purporting to vacate them was erroneously granted without jurisdiction, the petitions for review by this Court were filed too late and the Commissioner's motion to dismiss

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[8] *Katz* v. *Commissioner*, 188 F. 2d 957 (C.A. 2d); 7 Moore's Federal Practice (2d ed.) 4433.

the petitions for review for lack of jurisdiction shou
be granted.

Respectfully submitted,

CHARLES K. RICE,
Acting Assistant Attorney General.
LEE A. JACKSON,
I. HENRY KUTZ,
Attorneys,
Department of Justice,
Washington 25, D. C.

MARCH, 1956.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

* * * * *

(b)[9] *Collection of Deficiency Found by Board.*—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(h)[10] *Final Decisions of Board.*—For the purposes of this chapter the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1140.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

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[9] Internal Revenue Code of 1954, Section 6215(a), is substantially identical.

[10] Internal Revenue Code of 1954, Section 6214(c) reads as follows:

Final Decisions of Tax Court.—For purposes of this chapter and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481.

SEC. 1117.[11] REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proce
ing instituted before the Board and a decis
thereon shall be made as quickly as practical
The decision shall be made by a member in acco
ance with the report of the Board, and such decis
so made shall, when entered, be the decision of
Board.

(b) *Inclusion of Findings of Fact or Opini
in Report.*—It shall be the duty of the Board a
of each division to include in its report upon a
proceeding its findings of fact or opinion or me
orandum opinion, the Board shall report in writ
all its findings of fact, opinions and memorand
opinions.

(c) *Date of Decision.*—A decision of the Bo
(except a decision dismissing a proceeding
lack of jurisdiction) shall be held to be rende
upon the date that an order specifying the amo
of the deficiency is entered in the records of
Board. If the Board dismisses a proceeding
reasons other than lack of jurisdiction and is una
from the record to determine the amount of
deficiency determined by the Commissioner, o
the Board dismisses a proceeding for lack of ju
diction, an order to that effect shall be entered
the records of the Board, and the decision of
Board shall be held to be rendered upon the d
of such entry.

* * * * *

(26 U.S.C. 1952 ed., Sec. 1117.)

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[11] Internal Revenue Code of 1954, Section 7459(a), (b) and
is substantially identical.

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(a)[12] *Petition for Review Not Filed On Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

* * * * *

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

(26 U.S.C. 1952 ed., Sec. 1142.)

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[12] Internal Revenue Code of 1954, Section 7481(1) is substantially identical.

Internal Revenue Code of 1954:

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be review
by a United States Court of Appeals as provid
in section 7482 if a petition for such review is fil
by either the Secretary (or his delegate) or t
taxpayer within 3 months after the decision
rendered. * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7483.)

CERTIFICATE OF SERVICE

Service of copy of the within papers consisting
motion, notice of motion and brief in support of moti
to dismiss for lack of jurisdiction was made by mail t
day of March, 1956, on Robert Ash, Esqui
Attorney for Petitioners, addressed to his office, 19
Eye Street, N. W., Washington 6, D. C.

CHARLES K. RICE,
Acting Assistant Attorney General,
Department of Justice,
Washington 25, D. C.,
Attorney for Respondent.

APPENDIX B

THE TAX COURT OF THE UNITED STATES

Docket Nos. 26396 and 26397

BESSIE LASKY and JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

STATEMENT OF FACTS IN SUPPORT OF MOTION TO VACATE DECISIONS AND FOR REHEARING

On August 24, 1954, petitioners filed a motion for leave to file motion to vacate decisions out of time. This motion was granted by the Court on August 26, 1954, and a hearing was held on the motion to vacate decisions on September 14, 1954. The motion to vacate the decisions stated that a statement of facts and supporting affidavits would be filed in the near future. The supporting affidavits were filed on September 10, 1954. This statement of facts is filed in accordance with the motion to vacate decisions for purpose of granting petitioners a rehearing of the case on the merits. The Court should exercise its discretion and grant the motion to vacate the decisions and order a rehearing for the following reasons:

(1) The findings of fact and opinion of the Tax Court in the above-entitled case were promulgated April 8, 1954.

(2) Decisions were entered for respondent on April 8, 1954.

(3) As shown by the affidavits heretofore filed, in this case on September 10, 1954, the fact that the decisions were entered did not come to the attention of the petitioners until more than three months elapsed after they were entered.

(4) Copies of the decisions which were mailed
counsel for petitioners did not actually come to co
sel's attention upon their receipt as they were inadv
tently misfiled. Consequently, on numerous occasi
petitioners and other persons making inquiry on th
behalf, were advised by their counsel that the decisi
had not been received. This advice was given to p
tioners by their counsel through mistake of fact.

(5) Because petitioners had no knowledge that
decisions had been entered on April 8, 1954, and
cause their counsel advised them affirmatively upon
quiry that the decisions had not been entered, throu
no fault or negligence of the petitioners they did not
this motion to vacate the decisions within the time
lowed by Rule 19(e) of the rules of this Court.

(6) In view of the foregoing, good cause exists wh
justifies the Court in vacating the decisions heretof
entered on April 8, 1954, for the purpose of granti
petitioner a rehearing of the case on its merits. A
rehearing of the case the petitioner would present ad
tional evidence which will show that the opinion a
decision of the Court is wrong on its merits. The e
dence would show:

(a) That the agreement of May 15, 1940, a
the supplemental agreement of May 15, 1940,
which the petitioner sold to Warner Brothers
his right to the Sergeant York Story and War
Brothers agreed to pay petitioner a part of
gross receipts in varying percentages from the d
tribution of the photoplay are entirely separ
and distinct from the employment contract betw
petitioner and Warner Brothers dated May 8, 19

(b) The evidence would show in detail tha
bona fide dispute existed in 1942 between petitio
and Warner Brothers. Additional witnesses wo
be produced to establish this important fact.

(c) Evidence would be produced to show that the sale by petitioners on December 4, 1942, to United Artists Corporation was a bona fide sale to a third party with no understanding that United Artists Corporation would resell to Warner Brothers. This evidence would show conclusively that United Artists Corporation was not a mere intermediary in the transaction.

(d) The evidence would show in detail the business purpose behind petitioner's sale to United Artists Corporation on December 4, 1942.

(e) Upon receipt of this additional evidence at a rehearing it is petitioner's opinion that the Court will revise its opinion in accordance with the newly-presented facts and hold that the sale by the petitioners of their property rights to United Artists Corporation on December 4, 1942, was a bona fide sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code and that the transaction had been properly reported in their 1942 Federal Income Tax Return. Consequently, the decisions on the rehearing would be that there was no deficiency in tax due from the petitioners for the taxable year 1943.

(S.) Robert Ash,
1921 Eye Street, N. W.,
Washington, D. C.,
Attorney for Petitioners.

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